

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

August 15, 2007 Session

**WALTER RAY SMITH, JR. v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Rutherford County**

**No. F-57229 James K. Clayton, Jr., Judge**

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**No. M2007-00376-CCA-R3-PC - Filed March 10, 2008**

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Petitioner, Walter Ray Smith, Jr., was convicted by a Rutherford County jury of five counts of child rape. The trial court sentenced Petitioner to an effective sentence of forty years. Petitioner was unsuccessful on appeal. *State v. Walter Ray Smith, Jr.*, No. M2003-01291-CCA-R3-CD, 2004 WL 112879, at \*1 (Tenn. Crim. App., at Nashville, Jan. 23, 2004), *perm. app. denied*, (Tenn. June 21, 2004). Petitioner subsequently filed a petition for post-conviction relief in which he alleged he did not receive the effective assistance of counsel. The post-conviction court dismissed the petition following a hearing. Petitioner has appealed the dismissal. Petitioner argues that his trial counsel was ineffective in several ways. He argues that trial counsel failed to properly pursue the victim's allegedly contradictory testimony and to contact two potential witnesses. He also argues that trial counsel failed to interview and prepare a third witness to testify. Petitioner also argues that trial counsel failed to preserve his right to speedy trial and to effectively communicate with Petitioner. In addition, Petitioner argues that the cumulative effect of these errors entitles him to a new trial. We have thoroughly reviewed the record on appeal and conclude that Petitioner has not met his burden establishing that trial counsel's representation of Petitioner was in any way deficient. For this reason, we affirm the decision of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed**

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and ALAN E. GLENN, JJ., joined.

Jeremy W. Parham, Nashville, Tennessee, for the appellant, Walter Ray Smith, Jr.

Robert E. Cooper, Jr., Attorney General & Reporter; Benjamin A. Ball, Assistant Attorney General; Bill Whitesell, District Attorney General, for the appellee, State of Tennessee.

## OPINION

### *Factual Background*

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Petitioner dated Nancy Stafford from August of 1994 to August of 1997. *Walter Ray Smith, Jr.*, 2004 WL 112879, at \*1. In 1995, Petitioner and Ms. Stafford had a child together, Olivia. *Id.* H.S.<sup>1</sup> was Ms. Stafford's daughter from a previous relationship who was born on August 24, 1991. *Id.* H.S. was the victim in this case.

After Petitioner and Ms. Stafford ended their relationship in August of 1997, H.S. would accompany Olivia on her visitation with Petitioner. *Id.* H.S. called Petitioner "daddy" and treated him as if he were her father. *Id.* On April 13, 2000, Ms. Stafford saw H.S. with her hands in her panties "touching herself." *Id.* at \*2. H.S. told Ms. Stafford that Petitioner had been touching her, and Ms. Stafford called the authorities. *Id.*

As a result of the allegations, Petitioner was indicted for child rape. Following a jury trial, he was convicted of five counts of child rape. *Id.* The trial court sentenced Petitioner to twenty years for each conviction. *Id.* at \*4. The trial court ordered that two sentences be served concurrently to each other and the remaining three be served concurrently to each other but consecutively to the first two sentences. *Id.* Therefore, the trial court sentenced Petitioner to an effective sentence of forty years. *Id.*

Petitioner appealed his convictions and his sentence to this Court. *Id.* at \*1. This Court affirmed the convictions and the sentence. *Id.* On May 31, 2005, Petitioner filed a petition for post-conviction relief. After appointment of counsel, Petitioner filed two amended petitions. All three petitions were based upon Petitioner's allegations that he received ineffective assistance of counsel at trial.

### **Post-conviction Hearing**

On December 12, 2006, the post-conviction court held an evidentiary hearing. There were three witnesses at the hearing, Petitioner, Audie Williams, and trial counsel.

Petitioner was the first witness at the hearing. Petitioner testified that he was first represented by an attorney with the Public Defender's office. At some point after his preliminary hearing, trial counsel, who was also with the Public Defender's office, took over his case. Petitioner stated that he believed this change affected his representation because it resulted in a failure to get all the facts correct and resulted in his failure to obtain a speedy trial. After trial counsel took over Petitioner's case, he and Petitioner went over the testimony from the first preliminary hearing. According to Petitioner, trial counsel discussed the trial with Petitioner six or seven times. Most of the meetings

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<sup>1</sup> It is the policy of this Court to refer to minor victims by their initials.

lasted for thirty minutes, but a couple of the meetings lasted close to an hour. Petitioner testified that there was a juvenile court proceeding where there were inconsistencies in the victim's testimony. He and trial counsel discussed these inconsistencies. Because of these inconsistencies, Petitioner and trial counsel requested a second preliminary hearing because of these discussions. Petitioner maintained that the victim's testimony at trial was different from her testimony at the first preliminary hearing. However, trial counsel did not point out any of these inconsistencies in the victim's testimony at trial.

Petitioner also testified at the hearing that trial counsel did not obtain a copy of a lease with Farrer Brothers Trailer Park. Petitioner also requested that trial counsel locate and interview Mike Baker, who was an employee at Farrer Brothers. Petitioner stated that Mr. Baker could testify to the fact that Petitioner did not move into the trailer park until after the date that the alleged incidents occurred. Petitioner stated that trial counsel told him a copy of the lease was unnecessary because there was a witness who could testify about his move-in date to Farrer Brothers Trailer Park. Petitioner did not have a copy of the lease at the time of the post-conviction hearing.

Petitioner also testified that he believed the victim's mother made allegations of child rape against him because of difficulties between them regarding his visitation with their daughter, Olivia. Petitioner had filed contempt charges against Ms. Stafford because of these difficulties. According to Petitioner, Ms. Stafford and Petitioner had a telephone conversation where she made an unspecified threat in an effort to persuade him to drop the contempt charges. Petitioner recalled that trial counsel asked Ms. Stafford during the trial if she had made such a threat, and she denied it. Petitioner also testified that there were two witnesses, Jessica McDougal and Willie Cook, in the room when he received the threatening telephone call from Ms. Stafford. Petitioner gave trial counsel their contact information as potential witnesses, but trial counsel did not call Ms. McDougal for trial. Petitioner stated that trial counsel told him she could not be found and served with a subpoena. Petitioner stated that he did not have any way to contact her at the time of the post-conviction hearing.

Petitioner testified that Ms. Stafford first filed a complaint against him in April of 2000. Petitioner was not brought to trial until January of 2002. Petitioner believed he was prejudiced by the delay. He asked trial counsel to file a motion for a speedy trial, but trial counsel said he thought things were moving along as they should.

Audie Williams is Petitioner's former brother-in-law. Mr. Williams testified at Petitioner's trial. The prosecution alleged that incidents of sexual abuse by the Petitioner against the victim occurred in Mr. Williams' house. At the post-conviction hearing, Mr. Williams stated that trial counsel failed to elicit pertinent information about the size and layout of Mr. Williams's house. Mr. Williams testified that it would have been impossible for any incidents of sexual abuse to occur in his home because the house is so small, "you can hear just about anything in that house." Mr. Williams also stated that he was not at the house at all times when H.S. was in the house. He testified that the victim, her half-sister, Petitioner and Petitioner's son would all stay in the same

bedroom at his house. He stated that he could see into the bedroom and that, “[n]o doors are allowed shut in my house unless you’re using the bathroom . . . .”

Trial counsel was the final witness at the hearing. Trial counsel stated that he reviewed a transcript of the first preliminary hearing which was held on November 9, 2000. Trial counsel found the victim’s testimony at the first preliminary hearing and the trial to be largely consistent. The victim did get the dates mixed up, but what the victim alleged had occurred “was consistent from hearing to hearing.” Trial counsel testified that he did not cross-examine the victim about the consistency of her testimony because he found that she was “fairly descriptive and fairly consistent about several incidences [sic].” Trial counsel testified that the trial strategy was to get the victim off the stand as quickly as possible, instead of having her repeat the allegations over and over.

Trial counsel and the Public Defender’s office investigator attempted to get a copy of Petitioner’s lease from Farrer Brothers but were unable to obtain one. Trial counsel also recalled that the investigator spoke with Ms. McDougal. Trial counsel read the interview notes. He subpoenaed Ms. McDougal. Initially, she was anxious to testify and help Petitioner. However, when trial counsel attempted to serve a second subpoena, she had disappeared. When he discovered that Ms. McDougal could not be found, trial counsel discussed it with Petitioner. Petitioner told trial counsel that he wanted to proceed to trial without Ms. McDougal.

On January 3, 2007, the post-conviction court filed its ruling dismissing the petition. The post-conviction court made the following findings:

[Petitioner] alleged that there were inconsistencies in statements made by [the victim and her mother]. [Trial counsel] stated that the statements were consistent with reference to what was said and that any difference was with reference to dates.

[Petitioner] did not show any prejudice nor did he allege any. [Trial counsel] further stated that he had subpoenaed a witness who was unserved, but that [Petitioner] did not want a continuance, rather that he wanted to go on with the trial, that he insisted on it. [Petitioner] did not mention this problem.

At the hearing Petitioner called one witness, a Mr. Audie Ray Williams, who testified that some of the alleged rapes took place at his trailer, that no doors were allowed to be shut in his home. And I find that statement to be very farfetched and incredible.

There was no issue to present to the jury with reference to [Petitioner’s] identification since he agreed that he was there. From all evidence adduced at the hearing on Post Conviction Relief, I feel that the Petitioner has failed to show that he was not properly represented at trial or that there was any prejudice which affected the final outcome.

On January 18, 2007, Petitioner filed a timely notice of appeal.

## **ANALYSIS**

### **Post-conviction Standard of Review**

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

### **Ineffective Assistance of Counsel**

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This

Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

#### Proper Investigation

Petitioner argues that his trial counsel failed to: (1) investigate the victim's testimony at the preliminary hearing and impeach her with that testimony at trial; (2) interview Mike Baker and subpoena documents from Farrer Brothers Trailer Park; (3) interview and prepare Audie Williams to testify at trial; and (4) investigate threats made against him by the victim's mother.

As noted above, there was more than one preliminary hearing. Trial counsel testified that Petitioner was represented by a different attorney at the first preliminary hearing. During the first preliminary hearing, the power went off, so a full transcript of the hearing was not available. Petitioner's trial counsel was assigned to the case immediately after the first preliminary hearing. Trial counsel stated that he reviewed the transcript that was available. He also stated that he reviewed notes that the first attorney had made as to the victim's testimony at the first preliminary hearing. Trial counsel conducted the second preliminary hearing himself. Trial counsel testified at the post-conviction hearing that he found the victim's trial testimony to be more or less consistent with her testimony at both preliminary hearings. Nothing in this record suggests otherwise. Thus, there is ample support for the trial counsel's finding that Petitioner failed to prove counsel rendered insufficient performance with regard to this issue.

Petitioner argues that trial counsel should have interviewed Mr. Baker, an employee at Farrer Brothers Trailer Park, who would have testified that Petitioner did not sign a lease until January 29, 2000. In addition, he faults trial counsel with failing to obtain a copy of his lease at Farrer Brothers Trailer Park. Petitioner maintains that the timing of the lease was material because the victim alleged that incidents occurred at Petitioner's residence at the trailer park near New Year's Day, but according to Petitioner, he did not move into the trailer park until January 29. At the hearing, trial counsel stated that he did not recognize the name of the witness, but he did remember discussing getting a copy of the lease. It is well-settled law that to be successful on a post-conviction petition based upon ineffective assistance of counsel due to the failure to present a witness at trial, a petitioner must present that witness at the post-conviction hearing. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). A post-conviction court may not speculate, "on the question of . . . what a witness's testimony might have been if introduced at trial." *Id.* *See also Wade v. State*, 914 S.W.2d 97, 102 (Tenn. Crim. App. 1995). Petitioner did not present Mr. Baker as a witness at the post-conviction hearing. Therefore, Petitioner has not borne his burden of showing the failure to call Mr. Baker as a witness was deficient performance. As for the copy of the lease, trial counsel testified that his investigator attempted to get a copy of the lease because Petitioner did not have a copy. The investigator was unable to obtain a copy. Moreover, counsel did, in fact, present evidence during

trial that Petitioner was not living at the trailer park at the time the victim alleged. Petitioner has not proven that his counsel rendered insufficient representation with regard to this issue.

Petitioner also argues that trial counsel erred in failing to investigate threats made against him by the victim's mother. Petitioner argues that trial counsel failed to call Jessica McDougal, who overheard Petitioner's end of a telephone call during which Petitioner alleges the threats were made. At the post-conviction hearing, trial counsel testified that he did indeed speak with Ms. McDougal and subpoenaed her. When he first spoke with her, she was eager to testify on Petitioner's behalf. However, when a second subpoena was issued for Ms. McDougal, she had disappeared. Trial counsel could not locate her. Trial counsel discussed the disappearance with Petitioner, and Petitioner stated he wanted to proceed to trial without her. Petitioner did not present this witness at the post-conviction hearing. As stated above, Petitioner must present witnesses at the post-conviction hearing to prevail on a claim of deficient representation for failing to call a witness at trial. *Black*, 794 S.W.2d at 757. A post-conviction court may not speculate, "on the question of . . . what a witness's testimony might have been if introduced at trial." *Id.* See also *Wade*, 914 S.W.2d at 102.

Petitioner also argues that trial counsel was ineffective because trial counsel did not adequately interview and prepare witness Audie Williams. Petitioner argues that the failure to interview and prepare the witness resulted in trial counsel failing to elicit relevant testimony from Mr. Williams. The victim alleged, and testified at trial, regarding several incidents of abuse at Mr. Williams' home. Petitioner argues that Mr. Williams could have testified that his home is very small, the bedroom door where the victim slept was always kept open, and no one could have engaged in sexual activity of any sort without Mr. Williams and his wife hearing it.

Mr. Williams was a witness at the post-conviction hearing. He testified to the above facts, his home is small, the door was left open and no one could have had sexual relations in the house without him knowing. However, Mr. Williams also testified that he was not at home at all times when the victim was in the house. The post-conviction court specifically found Mr. Williams' testimony "to be very farfetched and incredible." We find nothing in the record that preponderates against the post-conviction court's findings with regard to Mr. Williams's credibility.

Petitioner has not proven neither that the services rendered by trial counsel were deficient, nor that he was prejudiced by any lack of adequate investigation leading up to trial. Therefore, there is no evidence that preponderates against the post-conviction court's findings of fact, and Petitioner is not entitled to relief on the claim that trial counsel was ineffective in his investigation and preparation for trial.

#### Speedy Trial

Petitioner also argues that trial counsel was ineffective in failing to preserve Petitioner's right to a speedy trial. Petitioner argues that allegations of abuse were first reported in mid-April of 2000, but he was not tried on the charges until January 29, 2002. Petitioner argues that this time lapse

allowed the victim's mother to influence and coach the victim and resulted in the inability to call Ms. McDougal as a witness at trial.

Trial counsel testified that the initial preliminary hearing was held in November of 2000. He was not representing Petitioner at that time. Trial counsel stated that the decision to seek a second preliminary hearing was a decision made by trial counsel and Petitioner together. Petitioner also testified at the post-conviction hearing that he too wanted a second preliminary hearing. When the decision was made to request a second preliminary hearing, Petitioner knew that his trial would be delayed. Petitioner admitted on cross-examination at the post-conviction hearing that he knew there would be a delay in his trial due to the second preliminary hearing, but he wanted all the information he could get from a preliminary hearing for trial preparation.

Petitioner and trial counsel determined that a second preliminary hearing would be desirable because trial counsel was not representing Petitioner at the first preliminary hearing. In addition, the electricity went out at the first preliminary hearing, so a complete transcript of the evidence at the first preliminary hearing was not available. By having a second preliminary hearing, trial counsel could have full knowledge of the evidence presented at the second preliminary hearing, and he could see how the victim "performed under cross-examination." In addition, trial counsel wanted to make sure the victim's testimony was consistent with her testimony in the first preliminary hearing and a juvenile hearing also conducted in connection with these events. The hearing was scheduled for either the late spring or early summer. However, trial counsel had an emergency in his family, so the second preliminary hearing was rescheduled. According to the date stamp on the DVD of the hearing, the second preliminary hearing occurred on July 5, 2001. This caused further delay in the setting of the trial.

We stated above that this Court may not second-guess trial counsel's decisions if they are reasonably-based trial strategies. *Adkins*, 911 S.W.2d at 347. In this case, trial counsel was appointed after the first preliminary hearing had been conducted. A complete transcript of that first preliminary hearing was not available due to a power outage. Petitioner testified at the post-conviction hearing that he and trial counsel wanted a second preliminary hearing so that trial counsel could get a full account of the victim's testimony and see how victim would react when testifying.

As stated above, Petitioner argues that the delay allowed the victim to be coached and allowed for Ms. McDougal to disappear. However, aside from bare allegations, Petitioner has shown no evidence that the victim was coached. The same can be said of Ms. McDougal's disappearance. Petitioner has presented no proof that Ms. McDougal would have been present at the time of trial.

The only evidence of a cause of delay in the trial is the second preliminary hearing. We consider the request for a second preliminary hearing a tactical decision on trial counsel's part. In addition, Petitioner agreed to the second preliminary hearing, even after being told there would likely be a delay in his trial. Therefore, we conclude that trial counsel was not deficient in requesting a second preliminary hearing which caused a delay in Petitioner's trial. Petitioner agreed to the delay; therefore, he has not carried his burden of proving that trial counsel's representation was deficient.



Therefore, this issue is without merit.

#### Effective Communication

Petitioner also argues that his communication with trial counsel was insufficient. Petitioner testified at the post-conviction hearing that he met with trial counsel on six or seven occasions. According to Petitioner, most meetings lasted around thirty minutes, but some lasted as long as an hour. Trial counsel and Petitioner stated at the post-conviction hearing that they went over the victim's testimony in both preliminary hearings and at a juvenile court hearing. They also discussed the attempts to locate the lease with Farrer Brothers Trailer Park and Ms. McDougal as a witness.

It appears from testimony of both trial counsel and Petitioner that they met several times and discussed issues relevant to Petitioner's trial. Petitioner does not state why these meetings and discussions were inadequate or could have been improved. We conclude Petitioner has not proven that there was inadequate communication with his trial attorney.

Therefore, this issue is without merit.

#### Cumulative Effect of Trial Counsel's Errors

Finally, Petitioner argues that the cumulative effect of trial counsel's errors warrants a new trial. However, this Court has determined that trial counsel's representation of Petitioner was not ineffective. We conclude that there is no basis for Petitioner's claims.

#### CONCLUSION

For the foregoing reasons, we affirm the judgment of the post-conviction court.

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JERRY L. SMITH, JUDGE